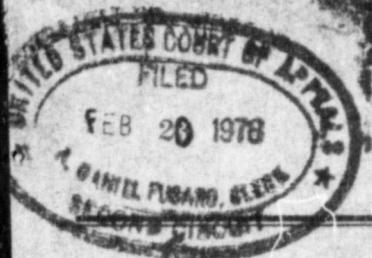


***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**





75-7634

IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

JOAQUIM CONCEICAO,  
*Plaintiff-Appellant,*

—against—

NEW JERSEY EXPORT MARINE CARPENTERS, INC.,  
*Defendant-Third Party Appellee,*

—and—

CIA DE NAV. MAR NETUMAR,  
*Third Party Defendant-Appellee,*

—against—

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,  
*Third Party Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**BRIEF OF  
THIRD PARTY DEFENDANT-APPELLEE  
INTERNATIONAL TERMINAL OPERATING  
COMPANY, INC.**

---

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IN THE  
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JOAQUIM C. DEICAO,

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—against—

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
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**BRIEF OF  
THIRD PARTY DEFENDANT-APPELLEE  
INTERNATIONAL TERMINAL OPERATING  
COMPANY, INC.**

---

**Statement**

This is an appeal by the plaintiff from an order of the Hon. Robert J. Ward, U.S.D.C.-S.D.N.Y., dated October 28, 1975, upon the Court's decision of October 10, 1975 deny-

ing the plaintiff's cross motion for a declaration of invalidity of the claim of the third party defendant International Terminal Operating Company, Inc. to funds in the sum of \$6,827.19 representing compensation payments made to the plaintiff and medical expenses paid on his behalf.

This action of a longshoreman against a shipowner who impleaded the stevedore-employer was tried before Judge Ward and a jury from October 29, 1973 to November 5, 1973 and the jury returned a verdict in favor of the plaintiff in the sum of \$42,000. In answering special questions, the jury found that the defendant shipowner was negligent but its vessel was not unseaworthy. The jury further found that the plaintiff was free of any contributory negligence. As to the third party complaint, although the jury found that International Terminal Operating Company, Inc., had breached its warranty of workmanlike performance of the stevedoring operation, it also found that the defendant shipowner was precluded by its conduct from recovering indemnity. This court affirmed the judgment entered on this jury verdict (508 F.2d 437) and the shipowner's petition for certiorari was denied, 95 S.Ct. 168.

Thereafter a dispute arose with regard to the stevedore's lien for compensation payments, made to the plaintiff and medical expenses, expended on his behalf, and shipowner's counsel moved in the District Court pursuant to Rule 67 of the Federal Rules of Civil Procedure to deposit the amount of the lien in the registry of the Court (A13a). Plaintiff-appellant opposed the motion and cross moved (A13a) to declare the third party defendant's claim for reimbursement of its lien to be invalid.

Judge Ward, in an opinion dated October 10, 1975 (A48a-A52a), denied plaintiff-appellant's cross motion and held

that the third party defendant International Terminal Operating Company, Inc. was entitled to reimbursement of the monies paid to the plaintiff for compensation and medical expenses. It is from this denial of his cross motion for a declaration of the invalidity of the third party defendant's lien that plaintiff-appellant appeals.

*If the appeal has not been rendered academic because the monies paid into the registry of the Court by Court order (A53a-A54a) have been paid out by Court order so that there is no res in the registry of the Court, the simple issue on this appeal is*

Who as between longshoreman and his stevedore employer is entitled to receive from a third party recovery the monies which the employer has been compelled to pay under the U.S. Longshoremen's & Harbor Workers' Compensation Act to the longshoreman as compensation and on his behalf for medical expenses?

### POINT I

**Third party defendant International Terminal Operating Company, Inc. is entitled by statute and decisional law to the amounts paid to the plaintiff for compensation and medical expenses out of the judgment recovered by the plaintiff in this case.**

Third party defendant-appellees claim to recover the monies paid to the plaintiff-appellant for compensation and medical expenses arises under the U.S. Longshoreman's and Harbor Workers' Compensation Act, 33 USCA Section 933, and not under any equitable doctrine. The law is well settled to the effect that the stevedore-employer may recover its compensation payments from the individual longshoreman's judgment awarded in an action against a

third party. This right of the stevedore to recoup these payments has long been recognized by the Courts, *The Etna*, 138 F. 2d 37 (C.C.A. 3rd 1943).

This principle was recently restated in *Landon v. Lief Hoegh and Co., Inc.*, 521 F. 2d 756 (C.C.A. 2nd 1975). In the *Landon* case, this court held that the stevedore-employer's right to recover payments made to its employee for compensation and medical expenses was statutory (pp. 759-760).

"The appellant recognizes at the outset that the Supreme Court in *Pope & Talbot v. Hawn*, 346 U.S. 406, 411-12, 74 S.Ct. 202, 98 L.Ed. 143 (1953), held that section 33 of the Act, 33 U.S.C. §933, has specific provisions to permit an employer to recoup his compensation payments out of any recovery from a third person negligently causing such injury, \* \* \*

This court in *Landon* also reaffirmed the fact that the compensation payments must be repaid to the employer out of plaintiff's third party recovery stating at page 760:

"*Burnside* did not, however, overrule *Halcyon*, nor *Pope & Talbot*. The rule still remains that the shipowner may not deduct the compensation payments from the plaintiff's recovery but must pay them to the employer under section 33 of the Act.

\* \* \* \* \*

Nor does the language of *Pope & Talbot* support appellant's view that the right of subrogation of the employer is different from a lien 'to recoup his compensation payments out of any recovery from a third person.' 346 U.S. at 412, 74 S.Ct. at 206."

Furthermore, this court in *Landon* went on to say that compensation payment recoupment may not be defeated

on the theory of concurrent negligence and clarified the term lien as it applies to the right of the employer to be reimbursed for such compensation payments stating in footnote number 3 at page 760:

"It is true, of course, that section 33(b) does not speak in the language of 'lien' but of 'an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person', and provides that the employer, after six months 'may . . . institute proceedings for the recovery of such damages' (§33(d)), but under the law, the compensation payment recoupment may not be defeated on the theory of concurrent negligence, in any event. As Judge Dooling observed below, 'Lien' is simply a shorthand and approximate expression. In common parlance the right of the carrier is to share in the proceeds of the plaintiff's recovery and is referred to as a 'lien.'"

Concededly, *Landon* was decided after the 1972 amendments to the U.S. Longshoreman's and Harbor Workers' Act. However, these amendments did not affect the employer's right to recover compensation payments made pursuant to the Act. In *The Etna*, supra it was held that the employer was entitled to reimbursement for monies paid in the nature of compensation even where the monies were paid *without an award* and that the employer's right to reimbursement out of the employee's recovery from a third person was based upon the U.S. Longshoreman's and Harbor Workers' Compensation Act as it read at that time.

In *The Etna*, the court said (pp. 40-41):

"But Sec. 33 (a) does not provide that the employee shall have a right to both compensation from his employer and damages from responsible third persons.

This, it seems to us, is an implicit recognition that the employer has a right to reimbursement for his outlay under the Compensation Act out of his employee's adequate recovery from a third person in all cases regardless of whether the employer has become the assignee of the employee's right of action against a third person by paying compensation '*under an award*' or has paid the compensation '*without an award*'—a procedure which the Act expressly directs employers to follow.

\* \* \* \* \*

We find no intent indicated by the Act to take away from the employer who pays compensation *without an award* his right to reimbursement out of his employee's recovery from third persons. On the contrary, we think that the intent and scheme of the Act requires the employer's right to subrogation for compensation payments made in the circumstances here shown be recognized wholly apart from and without regard for the assignment provided for in Sec. 33(b) of the Act. *It is only the right of control of the employee's right of action against third persons which an employer foregoes by paying compensation without an award. His right to reimbursement out of the recovery for the employee's injury remains unaffected.*" (Italics added.)

In *Fontana v. Pennsylvania Railroad Co.*, 106 F. Supp. 461, affirmed 205 F. 2d 151 (1952), Judge Weinfeld reviewed the authorities and, citing *The Etna*, held that the employer's right to recovery of compensation payments was based upon the U.S. Longshoreman's and Harbor Workers' Compensation Act and was not affected if the payments were made *without an award*. In *Fontana*, the court said (p. 463):

*"A further compelling consideration which may not be ignored is that the entire scheme of the Act negates*

*any theory that an injured employee is entitled to both compensation from his employer and damages from third parties. The Act imposes an absolute, but limited, liability on the part of the employer to pay compensation, and medical, hospital, nursing and other related benefits, which are exclusive and in place of all other liability of the employer. American Mutual Liability Ins. Co. v. Matthews, 2 Cir., 182 F.2d 322. The employee, however, is given the option to sue for full compensatory damages any third party, other than the employer, whom he claims may be liable for his injuries. He is given the choice of election but he may not have both compensation from his employer and damages from third parties." (Italics supplied.)*

Although plaintiff-appellant is proceeding on the theory that he is entitled to retain under equitable principles the compensation payments made to him in addition to the third party recovery against the shipowner, it is obvious that the equities are in favor of the third party defendant employer. To permit plaintiff to retain both the compensation payments and the fruits of his third party recovery would result in an unjust enrichment of and windfall to the plaintiff and frustrate the purpose of the Act. This was recognized by the Supreme Court in *Pope & Talbot Inc. v. Hawn*, 74 S. Ct. 202, 346 U.S. 406, 412:

"Consequently *Pope & Talbot* says that if *Hawn* keeps the money he will have a double recovery and that to allow him to repay *Haenn* would give an unconscionable reward to an employer whose negligence contributed to the injury. A weakness in this ingenious argument is that §33 of the Act has specific provisions to permit an employer to recoup his compensation payments out of any recovery from a third person negligently causing such injuries. *Pope & Talbot's* con-

tention if accepted would frustrate this purpose to protect employers who are subject to absolute liability of the Act. Moreover, reduction of Pope & Talbot's liability at the expense of Haenn would be the substantial equivalent of contribution which we declined to require in the *Halcyon* case."

The fact that the employer was found to have breached its warranty of workmanlike performance (which is relevant only to the rights and liability of shipowner and stevedore) or the fact that the third party defendant-employer attempted to defeat the plaintiff-appellant during the course of the trial of this case has no bearing upon its right in this Circuit to recover compensation payments and medical expenses made to the plaintiff. The law has long been established with regard to the repayment of the lien without any deductions as set forth by Judge Weinfeld in his opinion in the *Fontana* case which was affirmed by this court without opinion at 205 F. 2d 151. In this Circuit, the only question which has arisen since *Fontana* is the question of priorities of liens as between plaintiff's counsel and the carrier where the recovery in the litigation is insufficient for both. Those cases dealing with insufficient funds and the priorities between plaintiff's counsel and the compensation carrier are set forth in *Scozzari v. Jade Co., Inc.*, 355 F. Supp. 801.

It is also significant that in *Pope & Talbot v. Hawn*, supra, the employee was paid compensation payments *without a formal award*. Plaintiff-appellant's contention that there is no statutory basis for the employer's claim since no formal award was made is therefore without merit. See also *Ruggiero v. Liberty Mutual Ins. Co.*, 298 N.Y. 775; *International Terminal Operating Company, Inc. v. Miller*, 208 N.Y.S. 2d 813, 28 Misc. 2d 445; *Davis v. United States Lines Co.*, 253 F. 2d 262; *Joyner v. F. & B. Enter-*

*prises, Inc.*, 448 F. 2d 1185; *Hugev v. Damps. International*, 170 F. Supp. 601, affirmed 274 F. 2d 875.

The very contention advanced by the plaintiff-appellant on this appeal with respect to the employer's right of reimbursement of its compensation payments being an equitable one was recently analyzed at length in *Shellman v. United States Lines*, C.C.A. 9th Circuit, docket number 75-3058, decided November 21, 1975, in which the Court held that regardless of whether the lien was designated as equitable or legal, the stevedore-employer, even though concurrently negligent, was entitled to reimbursement for its compensation expenditures whether or not these payments were made with or without award stating in footnote number 2:

"The shipowner's contention is based on the premise that the employer's right of reimbursement is an equitable one. Being an equitable right, '[t]here is no equity in the principle that a stevedore should be allowed to enforce an unmitigated lien on a personal injury judgment which has been reduced because of the stevedore's concurrent negligence.' *Croshaw v. Koninklijke Nedlloyd, B.V. Rijswijk*, Civ. No. 74-250, 398 F. Supp. 1224, 1234 (D. Ore. July 31, 1975). Accordingly, the shipowner contends that the stevedore's lien should be reduced in proportion to its negligence.

Call the lien what we may, equitable or legal, the reduction of the stevedore's recovery would simply be another form of contribution which the Act seeks to prohibit. The Supreme Court in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), held that even though the stevedore was concurrently negligent, it could still recover its compensation lien in full. The Court noted 'reduction of [the shipowner's] liability at the expense of [the stevedore company] would be the substantial equivalent of contribution which we declined to re-

quire in the *Halcyon* case.' 346 U.S. at 412. In a recent case, the Second Circuit held that the rule stated in *Pope & Talbot* is still good law, *Landon v. Lief Hoegh and Co.*, No. 74-2304, 521 F.2d 756, 760 (2nd Cir. June 18, 1975).

If the employer pays the compensation without an award, then his lien is not under § 33(b) of the Act but is rather judicially created. See *Allen v. Texaco, Inc.*, 510 F.2d 977, 979-80 (5th Cir. 1975); *Fontana v. Pennsylvania R.R.*, 106 F. Supp. 461, 462-63 (S.D.N.Y. 1952), *aff'd sub. nom.*, *Fontana v. Grace Line, Inc.*, 205 F.2d 151 (2nd Cir.), *cert. denied*, 346 U.S. 886 (1953); *The Etna*, 138 F.2d 37, 41 (3rd Cir. 1943). *This mode of recovery, however, should not alter the result that the employer may recover his compensation lien in full.* See *Metropolitan Stevedore Co. v. Dampskisaktieselskabet International*, 274 F.2d 875 (9th Cir.), *cert. denied*, 363 U.S. 803 (1960). *The purpose of this Act would be frustrated if a different result could be reached merely because the employer pays compensation without entry of a formal award.* See *Louviere v. Shell Oil Company*, 509 F.2d 278, 283-84 (5th Cir. 1975). As stated by the Supreme Court, the shipowner is not entitled to contribution against the stevedore *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282, 284-85 (1952). Permitting him to retain such portion of the lien would be tantamount to contribution. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 412 (1953). The 1972 amendments to the Act do not effect this result. See *Cooper Stevedoring Co. v. Kopke, Inc.*, 417 U.S. 106, 112-13 n. 6 (1974). Contribution is still prohibited and any indirect method to accomplish the same result is also prohibited. *Landon v. Lief Hoegh and Co., Inc.*, No. 74-2304, 521 F.2d at 760 (2nd Cir. June 18, 1975). *We therefore believe that the stevedore em-*

*ployer, even though concurrently negligent, has a right to reimbursement for its expenditures made under the Act regardless of whether it has paid the compensation under an award or has paid the amount without such an award."* (Italics added)

The United States Court of Appeals for the Ninth Circuit on the very same day that it handed down its opinion in *Shellman* decided *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, Docket No. 75-1442, and in the cited case the ship-owner (in contrast to the plaintiff-employee in this case) argued that the third party defendant-employer should be denied a lien upon the plaintiff's judgment due to the fact that the employer was also negligent. In passing to its decision on that point and in citing *The Etna*, 138 F. 2d 37 and *Hugev v. Dampskisaktieselskabet International*, 170 F. Supp. 601, aff'd, 274 F. 2d 875 said (Page 198 of the slip sheets):

"We believe that this approach is supported by *strong* authority, and thus hold that the stevedore-employer, even though concurrently negligent, has a right to reimbursement for its expenditures made under the Act regardless of whether it has paid the compensation under an award or has paid the amount without such an award." (Italics added)

It is thus clear that the employer in this case, third party defendant-appellee, International Terminal Operating Company, Inc. is entitled by statute to recover the monies paid to the plaintiff by way of compensation and for medical expenses. It was never intended that an injured employee be entitled to both workmen's compensation benefits and damages in a third party action. This would not only constitute a double recovery but would result in an inequitable and unjust enrichment of the plaintiff. The employer's right to reimbursement from the plaintiff for compensation payments out of an employee's third party

recovery arose when the Longshoremen's and Harbor Workers' Act was originally enacted and has not been changed by the 1972 amendments thereto, nor is it affected if these payments are made without an award.

Turning now to plaintiff's contention that the employer should be required to share proportionately in the plaintiff appellant's attorney's fees and expenditures incurred in making the third party recovery, it should be remembered that we are dealing in this case with *sufficient* funds. There is no question of priority and there is no right of plaintiff's counsel or the plaintiff to recover from the employer any portion of the lien for expenses and legal fees of the plaintiff. In fact, this claim is unsubstantiated by the very authority relied upon by the plaintiff, to wit, *Chouest v. A & P Boat Rentals, Inc.*, 472 F. 2d 1026 (5th Cir. 1973).

Indeed, this question has already been resolved in this Circuit by Judge Weinfeld in the *Fontana* case where in his usual crystal clear opinion he stated at pages 463 and 464:

"Libelant next contends that in any event the employer ought equitably to bear a proportionate cost of the litigation. *Ocean S.S. Co. v. Lumbermen's Mutual Casualty Co.*, 2 Cir., 125 F. 2d 925, though decided under the New York Workmen's Compensation Law, is to the contrary. Of course, this decision under a different statute is not controlling. Nevertheless, the scheme of the Act also seems opposed to libelant's contention. Under Sec. 33(e), 33 U.S.C.A. §933(e), the proceeds of an action instituted by the employer against the third party, under an assignment of the cause of action to the employer pursuant to Sec. 33(b), are distributable as follows: the employer is entitled to retain (a) the expenses of the proceedings, (b) medical expenses, (c) compensation paid and (d) the present value of

the compensation thereafter payable, and only the excess then becomes payable to the injured employee or his representative. Thus, the Act treats the recovery as a fund charged first with the expense of the litigation and then with the amounts paid for compensation and medical expenses and the employee becomes entitled only to any excess finally remaining. There is no reason why a recovery obtained against the third party by the employee rather than the employer should be distributed differently. The expense of securing the recovery is, as in equity it should be, a first charge against the fund itself. As such it is immaterial whether the fund was created in a suit brought by the employer or one brought by the employee. *Huron, the employer, is therefore entitled to receive out of the \$4,000 settlement, its compensation and medical expense payments, without deduction for attorneys' fees or other litigation costs.*" Italics added.

This Court affirmed without opinion, 205 F.2d 151.

Plaintiff-appellant's reliance upon the *Chouest* case is misplaced. In fact, the Court in the *Chouest* case indicated that the question decided there would never even arise in the majority of cases where the amount of recovery is sufficient to reimburse the employer and pay the plaintiff's attorney. That decision was limited to the facts in that case. In the *Chouest* case, the court was dealing with insufficient funds to satisfy both the attorney's lien and the carrier's lien. Indeed, where the funds were sufficient to satisfy both liens, the same 5th Circuit in a later decision, *Lamar v. Admiral Shipping Corp.*, 476 F. 2d 300, held that the carrier was entitled to recovery of its full lien without any deductions.

In the *Lamar* case, the court said (p. 303):

"*Chouest* does not stand for the broad proposition posited by cross-appellants. The reallocation principles



it established 'need be undertaken only in very limited circumstances'. 472 F. 2d at 1037. *Chouest* was concerned with

the proper allocation between longshoreman and employer-intervenor (compensation carrier) of the proceeds of the longshoreman's recovery against a negligent shipowner, in a situation where the proceeds were insufficient to provide both full reimbursement for the employer's compensation payments and the attorney's fee of the longshoreman's lawyer.

472 F. 2d at 1030.

In the instant case, the question of reallocation does not arise because it is clear 'the amount of the recovery is sufficient both to reimburse, the intervenor and pay the plaintiff's attorney.' 472 F. 2d at 1037."

### CONCLUSION

The holding of the District Court denying the plaintiff's cross motion for a declaration of the invalidity of the claim of the third-party defendant to recover its lien and directing that the amount of the lien be paid to the third-party defendant International Terminal Operating Company, Inc. should be affirmed to which ends this brief is

Respectfully submitted,

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Service of 2 copies of this within

Brief is granted this

20 day of February 1976

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